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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19

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SONIA MAXWELL-COOKE and DAVID COOKE,

Plaintiffs,

- against -

SAFON LLC, NEWMARK KNIGHT FRANK GLOBAL MANAGEMENT SERVICES, INC. D/B/A/ NEWMARK KNIGHT FRANK, VERTICAL SYSTEMS ANALYSIS, INC., AND NOUVEAU ELEVATOR INDUSTRIES, INC.,

Defendants.

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Index No. 153275/2012
Motion Sequence 002

**DECISION & ORDER**

**KELLY O'NEILL LEVY, A.J.S.C.:**

In this personal injury action, defendant Nouveau Elevator Industries, Inc. ("NEI") moves to dismiss the complaint and all cross-claims asserted against it on the ground that the statute of limitations with respect to plaintiffs' claims against it has expired. For the reasons stated herein, the motion is granted.

Plaintiffs Sonia Maxwell-Cooke and her husband David Cooke (collectively, "Plaintiffs") filed suit on May 31, 2012 to recover for injuries allegedly sustained when the elevator inside the building located at 2-22 Washington Street in Manhattan malfunctioned and fell from the sixteenth floor down to the basement, causing Ms. Maxwell-Cooke to sustain serious injuries. The incident, Plaintiffs claim, was solely the result of negligence, carelessness and recklessness on the part of the defendants: building owner Safon LLC ("Safon"), managing agent Newmark Knight Frank Global Management Services, Inc. d/b/a Newmark Knight Frank ("Newmark"), elevator maintenance company Vertical Systems Analysis and unidentified defendant XYZ Corp. ("XYZ").

At a preliminary conference on August 28, 2013, the court (J. Singh) ordered defendants Safon and Newmark to provide Plaintiffs with the specifications of the elevator contract that was in effect

on the date of the accident, including the name of the subcontractor. Such information, which was not provided until June 11, 2014, identified NEI as the elevator maintenance contractor.

On October 8, 2014 the parties stipulated to amend the Summons and Complaint to add NEI as a defendant in place and stead of XYZ. On October 10, 2014, immediately following the compliance conference, Plaintiffs served NEI with notice of entry of the stipulation. Ten days later, on October 20, 2014, Plaintiffs filed their Supplemental Summons and Amended Verified Complaint and served copies upon NEI.

NEI now moves to dismiss the action against it pursuant to CPLR 3211(a)(5), which provides, in relevant part, that a "party may move for judgment dismissing one or more causes of action asserted against him on the ground that. . . the cause of action may not be maintained because of . . .statute of limitations." Defendant argues that application of CPLR 1024, which concerns how to proceed against an unknown party, does not toll the statute of limitations. Plaintiffs assert that the claims against NEI relate back to the date the claims were first interposed against the original Defendant XYZ, which was well within the limitations period.

CPLR 1024 provides, in relevant part, "that a party who is ignorant . . . of the . . .identity of a person who may properly be made a party, may proceed against such person as an unknown party by designating so much of his name and identity as is known. If the name or remainder of the name becomes known...all prior proceedings shall be deemed amended accordingly." However, in *Goldberg v Boatmax, Inc.*, 41 AD3d 255, 256 (1st Dept 2007), the First Department held that for a plaintiff to benefit from CPLR 1024, he must show "that he conducted a diligent inquiry into the actual identities of the intended defendants before the expiration of the statutory period." *See also Tucker v Lorieo*, 291 AD2d 261, 261 (1st Dept 2002) (statute of limitations was not tolled because plaintiff did not diligently attempt to establish the unknown identity until nine months after the statute of limitations had run).

As mentioned above, the incident at issue took place on June 5, 2009. Accordingly, Plaintiffs had three years, or until June 5, 2012 (see CPLR 214(5)) to timely commence this action. Plaintiffs' first formal attempt to identify NEI as a defendant was at the preliminary conference on August 28, 2013, more than a full year and two months after the statute of limitations had expired.

Further this action does not fall within the relation-back exception to the statute of limitations. A three-pronged relation-back doctrine was introduced by the Second Department in *Brock v Bua*, 83 AD2d 61 (2d Dept 1981), adopted by the Court of Appeals in *Mondello v New York Blood Ctr.-Greater New York Blood Program*, 80 NY2d 219, 226 (1992) and modified by *Buran v Coupal*, 87 NY2d 173 (1995). The *Brock* test, which is used to determine whether a claim will relate back to the date of a timely filed claim, requires that:

> (1) both claims arose out of same conduct, transaction or occurrence, (2) the new party is 'united in interest' with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits and (3) the new party knew or should have known that, but for a mistake by plaintiff as to the identity of the proper parties, the action would have been brought against him as well. *Tucker v Lorieo*, 291 AD2d 261, 262 (1st Dept 2002).

Since the statute of limitations has run as to any claims against NEI, Plaintiffs bear the burden to persuade the court that the doctrine applies here. *Garcia v New York-Presbyterian Hosp.*, 114 AD3d 615, 615 (1st Dept 2014).

There is no dispute that Plaintiffs' claims against each of the defendants arise from the same incident. Where the parties disagree is whether NEI is "united in interest" with the other defendants and whether NEI knew about or should have anticipated an action against it, but for a mistake on the Plaintiffs' part.

A relationship between two parties that is sufficient to give rise to vicarious liability of one party over the other will generally establish a unity in interest. *Mondello v New York Blood Ctr.-Greater New York Blood Program*, 80 NY2d 219, 225 (1992) *modified by Buran v Coupal*, 87 NY2d 173 (1995). In this regard, courts look at whether the "interest of the parties in the subject-matter is

such that they stand or fall together and that judgment against one will similarly affect the other." *Connell v Hayden*, 83 AD2d 30, 40 [quoting *Prudential Ins. Co. v Stone*, 270 NY 154, 159 (2d Dept 1981)].

While Plaintiffs are incredulous that Safon, Newmark and NEI, who were in contract together at the time of the injury, were united in interest with respect to the maintenance of the elevator, they do not offer any facts or caselaw to support their assertion. Furthermore, "joint tortfeasors are generally not united in interest, since they frequently have different defenses, in that one tortfeasor usually will seek to show that he or she is not at fault, but that it was the other tortfeasor who is liable." *LeBlanc v Skinner*, 103 AD3d 202, 210 (2d Dept 2012). *See also Vanderburg v Brodman,* 231 AD2d 146, 148 (1st Dept 1997) ("defendant[s] w[ere] not united in interest...since each will seek to show that he was not at fault and that it was the other who caused the injury."). Here, it is clear that the defendants are alleged joint tortfeasors and will try to prove the other defendants are responsible. Therefore it cannot be said that NEI is united in interest with the other defendants.

Plaintiffs also have failed to show that NEI knew or should have known that, but for a mistake by Plaintiff as to the identity of the proper parties, the action would have been brought against NEI as well. Significantly, Plaintiffs' failure to make a diligent inquiry into NEI's identity does not constitute a mistake within the meaning of the test. *See Tucker*, 291 AD2d at 261 (failure to identify unknown defendant because of untimely request of information was not deemed a mistake on the part of the plaintiff); s*ee also Opiela v May Indus. Corp.*, 10 AD3d 340, 341 (1st Dept 2004) (plaintiff could have obtained the contractor's identity within the time allotted by the statute of limitations and so the court did not consider it a mistake).

But even assuming, *arguendo*, that Plaintiffs made a "mistake," they have not shown that NEI knew about or should have anticipated a suit against it. Instead, Plaintiffs merely surmise that because

an incident report of Ms. Maxwell-Cooke's accident was filed it must have been sent to NEI in light of its responsibility for maintaining the elevator.

In light of the foregoing, it is hereby

ORDERED that defendant Nouveau Elevator Industries, Inc.'s motion to dismiss is granted; and it is further

ORDERED that the complaint and all cross-claims against defendant Nouveau Elevator Industries, Inc are severed and dismissed in their entirety; and it is further

ORDERED that this action shall continue against all other remaining defendants; and it is further

ORDERED that the remaining parties are directed to appear in Part 19 on September 30, 2015 at 9:30 a.m. for status conference; and it is further

ORDERED that a copy of this Order shall be served on the General Clerk's Office and the Clerk shall enter judgment accordingly.

This constitutes the decision and order of the court.

**ENTER:**

DATED: August 28, 2015
New York, New York

Kelly O'Neill Levy

**Kelly O'Neill Levy, A.J.S.C.**

**HON. KELLY O'NEILL LEVY**